

Examining spendthrift trusts and discretionary trusts in Florida: *Berlinger v. Casselberry*

by Jeffrey A. Baskies, Justin M. Savioli and A. Stephen Kotler

For the first time since the adoption of the Florida Trust Code (effective July 1, 2007), one of Florida's courts of appeal has looked at the crossroad of creditors' claims and third party trusts. In *Berlinger v. Casselberry*, Case No. 2D12-6470, 6 (Fla. 2d DCA Nov. 27, 2013), the Florida Second District Court of Appeal upheld a writ of garnishment against the trustee of a third party discretionary trust. The writ of garnishment allows the creditor control over and access to any present and future distributions made to or for the benefit of the trust's beneficiary.

The *Berlinger* holding is unique because it is the first case to interpret the Florida Trust Code provisions regarding spendthrift and discretionary trusts since the Florida Trust Code became effective on July 1, 2007. Also, it is the first case to examine whether the ruling in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), is still applicable to Florida trusts after the adoption of the Florida Trust Code.

Berlinger V. Casselberry: The background

Divorce proceeding and third party irrevocable trusts. Bruce Berlinger (Berlinger) and Roberta Casselberry (Casselberry) were divorced in 2007. Under the terms of a marital settlement agreement that was incorporated into a final judgment of dissolution of marriage, Berlinger agreed to pay to Casselberry \$16,000 per month in alimony.

After the divorce, Berlinger stopped working and lived off distributions made from several trusts created for his benefit by others (third party trusts, the trusts). The trusts permitted distributions to or for the benefit of Berlinger in the discretion of the trustees of the various trusts (trustees).

In May 2011, Berlinger stopped paying alimony to Casselberry. In

response, Casselberry filed a motion to enforce the alimony. Subsequently, Berlinger and Casselberry entered into a settlement agreement requiring Berlinger to pay certain amounts to Casselberry. Berlinger satisfied most of his payment obligations under the settlement agreement, but a small balance remained owing. Casselberry went to court to enforce the terms of the settlement, and the judge issued the writs of garnishment.

The writs of garnishment acted like a charging lien in an LLC context. The trustees were not obligated to dig into the trusts to satisfy the debt, but they were directed that if they exercised discretion to make distributions to or for Berlinger, then those distributions must instead be made to Casselberry until her past due alimony was paid in full.

Berlinger appealed the trial court's order issuing the continuing writs of garnishment against the trustees; however, the Florida Second District Court of Appeal affirmed the trial court's ruling.

Self-settled irrevocable trusts. In addition to the third party trusts, there is brief discussion in the holding about self-settled trusts under Florida law. The court notes that in 2011, Berlinger conveyed certain real property to an irrevocable life insurance trust (the ILIT) that was not previously disclosed to Casselberry. To the extent the ILIT was funded by Berlinger, it would be deemed self-settled under Florida law. Under the Florida Trust Code, access by creditors to self-settled trusts is governed by Florida Statutes § 736.0505(1)(b), which provides that a creditor of a settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. However, after the initial reference to the ILIT, the court does not provide

any further discussion of the self-settled trust issue. Therefore, the balance of this article will focus only on the third party trusts.

Understanding the creditors' rights provisions of the Florida Trust Code as applied to third party created spendthrift trusts and discretionary trusts

In Part V of the Florida Trust Code (F.S. §§ 736.0501-736.0507), Florida law addresses whether a judgment creditor can enforce its rights to attach and/or garnish (see chapters 76 and 77, F.S.) against the interests of beneficiaries of trusts. These provisions of Part V were addressed as part of the *Berlinger* holding and should be reviewed.

The Trust Code creates four types of irrevocable trusts that must be analyzed separately as to availability to creditors.

1) The first type are self-settled trusts and as noted above, access by creditors to self-settled trusts is governed by F.S. § 736.0505(1)(b). Essentially, creditors can reach the maximum amount that can be distributed to the settlor.

2) The second type of irrevocable trusts to consider are those with mandatory payments (e.g., pay all the income to my son) that are not protected by spendthrift clauses. Creditor access to those trusts is governed by F.S. § 736.0501, which provides that:

Except as provided in [F.S. §] 736.0504, to the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means. The court may limit the award to such relief as is appropriate under the circumstances.

The statute's exclusion of F.S. § 736.0504 means that it only applies to trusts that are not discretionary, and by its own terms, the statute only applies to trusts that are "not subject to a spendthrift provision." Thus, F.S. § 736.0501 only applies to mandatory distributions from irrevocable trusts that are not subject to a spendthrift clause. For any such trusts (and hopefully there are not too many of them), the court may permit a creditor to reach the beneficiary's interests and attach the present or future required distributions.

3) The third type of trusts to consider are those with mandatory distributions that do have spendthrift clauses (spendthrift trusts). As to spendthrift trusts protected "only" by a spendthrift clause (e.g., a trust that provides that the trustee shall pay all of the income of the trust at least annually to the beneficiary but also contains a spendthrift provision), the Florida Trust Code (F.S. §§ 736.0501-736.0503) adopted a different set of rules.

As to spendthrift trusts, F.S. § 736.0502 provides in relevant part that in a trust containing both mandatory distributions to a beneficiary (thus not a discretionary trust as described in more detail below) and a spendthrift provision, "except as otherwise provided in this part ... a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary." A spendthrift provision prohibits a beneficiary from transferring his or her right to distributions and prevents a creditor of a beneficiary from attaching the beneficiary's interest prior to actual receipt of a distribution from the trust. In jurisdictions that recognize a spendthrift provision, including Florida, such a provision will prevent creditors from reaching a beneficiary's interest in a trust with mandatory payments prior to the beneficiary's actual receipt.

Thus, as to most creditors, spendthrift

clauses are to be respected, and *most* creditors cannot get at the trust's assets or attach the distributions. However, spendthrift protection will not prevail as to all creditors. Pursuant to F.S. § 736.0503, there are certain exception creditors (e.g., minor children and present or former spouses for support, the state of Florida and the federal government) who are permitted to reach a beneficiary's mandatory distributions from a third party irrevocable spendthrift trust. In summary, when drafting the Florida Trust Code, the Legislature essentially adopted the public policy as expressed in the *Bacardi* case (validating spendthrift trusts versus most creditors but not against certain limited judgments for support).

Florida Statutes §§ 736.0503(2) and (3) allow exception creditors to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary. However, the Legislature determined that avoiding spendthrift clauses should be the exception, not the norm, and F.S. § 736.0503(3) provides that the ability of exception creditors to pierce spendthrift trusts should apply "only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient."

4) The fourth and final type of trusts to consider are those that contain no mandatory distribution provisions and instead only permit distributions to be made (or not made) in the trustee's sole discretion (discretionary trusts). The treatment of creditors' claims against discretionary trusts is also treated separately and differently under the Florida Trust Code. For discretionary trusts (those where distributions are in the discretion of the trustee, regardless of whether such trusts include spendthrift clauses or not), creditors' claims as to beneficiaries should be treated differently. These provisions are in a separate statute, F.S. § 736.0504. That statute does not allow for exception creditors and specifically says the provisions relating to exception creditors under F.S. § 736.0503 do not apply.

Notwithstanding the rights granted to exception creditors under F.S.

§ 736.0503(3), F.S. § 736.0504 provides that a creditor of a beneficiary of a discretionary trust, *regardless* of whether it includes a spendthrift provision, may not compel a distribution or "[a]ttach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary."

Conclusion: The *Berlinger* court opinion in your practice

In allowing Casselberry to garnish Berlinger's potential interests as a discretionary beneficiary, the court appears to extend F.S. § 736.0504(2) beyond its intended scope. The court did so in reliance on the public policies and the holding in *Bacardi v White*, 463 So. 2d 218 (1985).

While noting that the creditor remedies provided in F.S. § 736.0503(3) are subject to the exception found in F.S. § 736.0504(2), the court nevertheless concludes that F.S. § 736.0504(2) "does not expressly prohibit a former spouse [a creditor] from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion." In its analysis the court determines that while F.S. § 736.0504(2) prohibits a court order against a discretionary trustee either compelling a distribution or attaching the beneficiary's interest, it would *not* prohibit a court order granting a writ of garnishment against discretionary distributions made by the trustee. Thus, the court's holding provides that a writ of garnishment may attach to the beneficiary's interests in a trust, like a charging order applies in the context of a debtor's interest in a limited partnership or a limited liability company.

While the *Berlinger* holding may overstep the express terms of the Florida Trust Code, until it is overturned on rehearing or appeal, or another district court of appeal issues a contrary opinion, the *Berlinger* holding appears to be the law in Florida.

Some advisors are suggesting most (if not all) irrevocable trusts should be moved from Florida to other more protective jurisdictions. As the *Berlinger* case

Spendthrift trusts

from preceding page

may be reheard and overturned, it seems a bit premature to move all third party discretionary trusts from Florida. However, those clients specifically expressing the desire to protect the beneficiaries of a trust from exception creditors, such as ex-spouses, or those beneficiaries who are "already in the soup" will want due consideration given now to moving the trust, because the luxury of wait and see may not be an option.

Jeffrey A. Baskies is a native of Peabody, Mass., and a graduate of Trinity College (with highest honors) and Harvard Law School (with honors). A member of the Florida and Massachu-

setts bars, he is a co-founding partner of Katz Baskies LLC, located in Boca Raton, Fla., concentrating on trusts and estates, tax and business law. He is board certified by The Florida Bar as an expert / specialist in wills, trusts and estates law and is AV preeminent® rated by Martindale-Hubbell.

Justin M. Savioli is a graduate of the University of Miami (B.A.) and University of Miami School of Law (J.D., cum laude). He served as an articles and comments editor on the University of Miami Inter-American Law Review and was a member of Phi Alpha Delta, a professional law fraternity. He received his Master's of Laws in taxation (LL.M.) from the University of Florida. Mr. Savioli is a member of The Florida Bar, the South Palm Beach County Bar Association

and the Greater Boca Raton Estate Planning Council.

A. Stephen Kotler, a Florida Bar board certified wills, trusts and estates lawyer, is a solo practitioner in Naples, Fla., whose practice emphasizes estate planning, asset protection, probate administration, federal transfer tax and elder law. He is AV rated by Martindale Hubbell, a Florida Super Lawyer and selected as a Best Lawyer and to Florida Trend's Legal Elite. He is a member of the executive councils of the Elder Law and the Real Property, Probate and Trust Law sections. He holds an LL.M. in estate planning from the University of Miami School of Law, a J.D. from Emory University School of Law and a B.S. from Cornell University.

If you've got questions, we've got answers!



If you have questions or concerns about the administrative management of your practice, our LOMAS Practice Management Advisors are an invaluable resource.

ASK US ABOUT LAW FIRM MANAGEMENT:

- Firm structure and governance;
- Financial management;
- Trust accounting;
- Records information management;
- Work flow processes;
- Technology utilization, tips and trends
- Personnel management;
- and more.

**Starting, growing, or retiring...
LOMAS provides assistance.**

The Law Office Management Assistance Service
of The Florida Bar

**Call the LOMAS Help Line
Toll-Free: 866.730.2020**

Or visit us on the web at www.floridabar.org/lomas



THE FLORIDA BAR



THE FLORIDA BAR